

STATE OF MICHIGAN  
MACOMB COUNTY CIRCUIT COURT

MICHAEL DEMIL, an individual,

Plaintiff/Counter-Defendant,

vs.

Case No. 2012-889-CK

RMD HOLDINGS, LTD, a Michigan corporation  
and ROBERT E. DEMIL, an individual,

Defendants/Counter-Plaintiffs.

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OPINION AND ORDER

Defendants RMD Holdings, Ltd. (“RMD”) and Robert E. Demil (“Defendant Demil”) have filed a renewed motion for summary disposition of Count V of Plaintiff’s second amended complaint. Plaintiff has filed a response and requests that the motion be denied.

*Factual and Procedural History*

One of the Plaintiff’s claims is based on his allegation that he was terminated in retaliation for reporting an alleged assault committed by RMD’s corporate counsel, Rogue Tyson, in violation of the Michigan Whistleblower’s Protection Act (“WPA”). Defendants initially moved for summary disposition of that claim in November 2012. In January 2013, Judge Richard L. Caretti entered an Opinion and Order denying Defendants’ motion without prejudice. Specifically, Judge Caretti held:

[T]he Court is convinced that the appropriate disposition of [Plaintiff’s WPA claim] is to deny [Defendants’ motion] without prejudice as this issue could be revisited once discovery has been completed and further evidence establishing the motivation for Plaintiff M. Demil’s termination may be brought to light.

On March 4, 2015, Defendants filed their instant renewed motion for summary disposition of Plaintiff's WPA claim. Plaintiff has filed a response and requests that the motion be denied. In addition, Defendants have filed a reply brief in support of their motion. Further, Plaintiff has filed a sur-reply in opposition to the instant motion. On April 6, 2015, the Court held a hearing in connection with the motion and took the matter under advisement.

### *Standard of Review*

A motion under MCR 2.116(C)(10) tests the factual support of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing such a motion, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* The Court must only consider the substantively admissible evidence actually proffered in opposition to the motion, and may not rely on the mere possibility that the claim might be supported by evidence produced at trial. *Id.*, at 121.

### *Arguments and Analysis*

As a preliminary matter, the Court has already held that Plaintiff engaged in a protected activity under the WPA by reporting an alleged assault to the police. *See* January 9, 2013 Opinion and Order, at p. 10.

The remaining issue, which is the issue the Court invited Defendants to revisit in the event they obtained additional evidence, is whether the non-discriminatory reasons offered by Defendants for Plaintiff's termination, which is continuing insubordination, is merely a pretext. *See Eckstein v Kuhn*, 160 Mich App 240, 246; 408 NW2d 131 (1987).

With respect to this issue, the only evidence indicating that Plaintiff was terminated, at least in part, in retaliation for engaging in the protected activity, is the timing of Plaintiff's termination (shortly after Plaintiff engaged in the protected activity), and a termination letter sent by Defendant Demil to Plaintiff in which he stated "due to your actions today at the office, I asked you to leave, and told you that it is in the best interest that you no longer come in. Your employment is terminated." (See Exhibit H to Plaintiffs' response.)

In their motion, Defendants cite to Defendant Demil's November 16, 2012 affidavit in which he testified that his decision to terminate Plaintiff's employment was not due to Plaintiff reporting the alleged assault to the police. (See Defendants' Exhibit E.) Moreover, the Court has recently concluded a multi-day hearing during which the Court heard the testimony of, *inter alia*, Plaintiff, Defendant Demil and other RMD employees. Defendant Demil and Plaintiff both testified that their relationship became strained over a prolonged period of time and that there were various points of contention between the parties which culminated in Plaintiff's termination. However, the testimony of the witnesses elicited no evidence that Plaintiff's termination had any reasonable relationship/connection to Plaintiff reporting the alleged assault to the police.

In order to establish a *prima facie* case of retaliation under the WPA, a plaintiff must prove, *inter alia*, that his participation in the protected activity was a significant factor in the adverse employment action. *Shallal v Catholic Social Serv of Wayne County*, 455 Mich 604; 566 NW2d 571 (1997). In this case, there has been overwhelming testimony that Plaintiff's termination was the result of Plaintiff's consistent insubordination and the parties' general and increasing animosity towards each other. While Plaintiff's termination occurred shortly after he reported the incident to the police, the termination, and incident forming the basis for the

protected activity, were caused first and foremost on Plaintiff's decision to disregard Defendant Demil's instructions and engage in disruptive activities. After reviewing the extensive record before it, the Court is convinced that Plaintiff's protected action was not a significant factor in Defendant Demil's decision to terminate his employment. Consequently, Plaintiff's WPA claim fails and must be dismissed.

*Conclusion*

For the reasons discussed above, Defendants motion for summary disposition of Count V (Whistleblower Protection Act) of Plaintiff's second amended complaint is GRANTED.

Pursuant to MCR 2.602(A)(3), the Court states this Opinion and Order neither resolves the last claim nor closes the case.

IT IS SO ORDERED.

/s/ John C. Foster  
JOHN C. FOSTER, Circuit Judge

Dated: May 4, 2015

JCF/sr

Cc: *via e-mail only*

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